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No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1940

HIRAM K. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 69–73) is reported in 113 F. (2d) 286.

JURISDICTION

The judgment sought to be reviewed was entered June 29, 1940 (R. 73). A petition for rehearing (R. 75–78) was denied July 22, 1940 (R. 78). The petition for writ of certiorari was filed August 26, 1940, and granted October 14, 1940 (R. 79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the

Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

Petitioner pleaded *nolo contendere* to an indictment containing ten substantive counts and one conspiracy count, and was sentenced to three years imprisonment on each count, the sentences to run concurrently. The questions are:

1. Whether the "plea in bar" filed by petitioner states facts sufficient, if proved, to establish his immunity from prosecution on the ground that, after a claim of privilege, he was compelled to testify against himself in an investigation conducted by the Securities and Exchange Commission.

2. If the plea in bar is sufficient on its face, whether petitioner was denied an opportunity to prove his plea and, in particular, whether the District Court's refusal to order production of transcripts of petitioner's testimony before the Securities and Exchange Commission constituted a denial of such an opportunity.

3. If the District Court should have ordered production of the transcripts or should itself have examined the transcripts, whether its failure to do so constituted reversible error.

4. Whether the Circuit Court of Appeals erred in receiving an affidavit filed by the Government, and transcripts of petitioner's testimony before the Securities and Exchange Commission, and, if so, whether the error was prejudicial to petitioner.

5. Whether the fact that the Circuit Court of Appeals, in rejecting petitioner's contention that the indictment was invalid, confined itself to ruling that the conspiracy count (which alone would not support a three-year sentence) was valid constitutes reversible error, where the objections raised by petitioner to the conspiracy count comprehend all of the objections raised by petitioner which are applicable to counts 4 and 5 of the indictment, each of these counts being sufficient to support the sentence imposed.

6. Whether the indictment is valid.

7. Whether this Court has power to correct the error of the District Court in imposing a three-year sentence on the conspiracy count.

STATUTES AND RULES INVOLVED

The pertinent provisions of the statutes involved, as well as the applicable Rules of the Securities and Exchange Commission, are printed in the Appendix, *infra*, pp. 48–52.

STATEMENT

On November 15, 1938, an indictment in eleven counts was returned in the United States District Court for the Western District of Oklahoma against the petitioner and another (R. 4–39).[1] The first three counts of the indictment charge the

[1] The case was dismissed as to petitioner's co-defendant on January 29, 1940, on motion of the United States Attorney (R. 50).

defendants with violating the fraud provisions (Secs. 17 (a) (1) and (2)) of the Securities Act of 1933, as amended (15 U. S. C. § 77q (a)). Counts four and five charge violations of the registration provisions (Secs. 5 (a) (1) and (2)) of that Act (15 U. S. C. § 77e). Counts six to ten charge violations of the mail fraud statute (Criminal Code, Sec. 215; 18 U. S. C. § 338); and the eleventh count charges a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C. § 88) to commit the offenses charged in the first ten counts. Petitioner pleaded *nolo contendere* to the indictment (R. 49) and was sentenced to imprisonment for a term of three years on each count, the sentences to run concurrently (R. 49–50).

All the substantive counts of the indictment except counts four and five charge the defendants with devising a scheme to defraud various named persons and using the mails in aid of that purpose. The material facts outlining the scheme are found in the first count (R. 5–11). It appears from the allegations in this count that the defendants acquired interests in four oil and gas leases in Oklahoma and Texas and organized five trusts under the laws of Oklahoma to hold title to the leases. In order to sell "beneficial interests" in the trusts, defendants issued various pamphlets, letters, and circulars describing the property owned and the possibilities of reaping large profits from the operation of oil and gas wells. A constant flow of

these pamphlets and letters from June 1936, to February 1937, developed a glowing picture of great expectations actually being realized. The indictment alleges misrepresentations varying from extravagant and unwarranted hopes to specific misstatements of fact, all made with the intent of defrauding prospective purchasers of the shares.

Typical of the representations which are alleged to have been false and known to the defendants to have been false are the following: that a well on property adjoining the Lucky Indian lease, belonging to the H. R. Edwards Comanche County, Oklahoma, Trust, had been completed as a "200-barrel per day well" (R. 8); that "Lucky Indian" had been proven for commercial production (R. 8); that a well drilled on the property of the Comanche County Trust was a good commercial gas well (R. 8); that almost pure oil had been taken from a well on the property (R. 9); that property of the Indian Chief Trust, organized by petitioner, was proven for production of oil and gas and that this property was surrounded on three sides by producing wells (R. 9); that tests disclosed that commercial production in large quantities on Indian Chief property was feasible and that high gas pressure had been found under the property (R. 10). The completed picture depicted in the pamphlets was that of a large area of rich oil-bearing property owned by the trusts, completely surrounded by proven fields. The description of the properties

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was interlarded with promises of immediate huge profits to purchasers of "interests" and exhortations to hurry with orders for such "interests" before they were all gone. A letter to Willard W. Penry, set out in full in the third count (R. 13–22), gives a clear picture of the type of fraud with which the indictment charges the defendants.

The indictment alleges that, in fact, the properties owned by the trusts were not adjacent to the producing fields but were separated from them by a sterile area in which wells had been sunk and abandoned as "dry holes" (R. 23, 24). The indictment also alleges that the properties owned by defendants' trusts were wholly lacking in possibility of oil or gas production.

Counts four and five of the indictment charge the defendants with wilfully using the mails in the sale, and delivery after sale, of certificates of beneficial interests in one of the trusts, in violation of Sections 5 (a) (1) and (2) of the Securities Act of 1933, as amended. These counts allege that the certificates were of the class and character of securities defined by Section 2 of the Securities Act and that the defendants had sold them, and delivered them after sale, at a time when there was not in effect a registration statement covering such certificates filed with the Securities and Exchange Commission under the provisions of Section 5 (a) of the Securities Act.

On December 17, 1938, petitioner was arraigned and entered a plea of not guilty (R. 49). On March

1, 1939, he was granted leave to withdraw his plea of not guilty and presented a demurrer to the indictment (R. 48). In this demurrer, which was filed on December 16, 1938 (R. 39), petitioner attacked the validity of the indictment as a whole and the sufficiency of each of its counts (R. 39–41). The demurrer was overruled by the District Court and petitioner then re-entered his plea of not guilty (H. 48).

On December 16, 1938, petitioner also filed a "Plea in Bar and Application for Production of Transcript of Evidence" (R. 41–44). In this plea, petitioner alleged that on three different occasions he had appeared before an officer of the Securities and Exchange Commission in response to *subpoenas duces tecum* and—

> after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution. (R. 42.)

The petitioner further alleged that by reason of having been compelled to testify against himself, after claiming his privilege, he was immune from prosecution under the Constitution and under Section 22 of the Securities Act (15 U. S. C., § 77 v (c)).

The pleading also contained an "Application for Production of Transcript of Evidence" in which petitioner asked the District Court to order the Securities and Exchange Commission to produce and to submit to him a transcript of his testimony before the Commission. He alleged that production of this transcript was necessary in order to allow him to present, and the court to pass upon, the plea in bar.

The pleading ends with a prayer that the transcript be produced and submitted to petitioner, that petitioner be heard on the merits of his plea in bar, and that the prosecution be barred and the indictment dismissed by virtue of the alleged compulsory self-incrimination. The pleading was verified by the petitioner. Attached to it as an exhibit was a letter from the General Counsel of the Securities and Exchange Commission to petitioner's attorney, refusing a request by the attorney for a transcript of the testimony taken by the Commission. The letter states in part (R. 44):

> Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for

> criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case * * *.

On February 28, 1939, counsel for the Government filed a pleading entitled "Motion to Strike Plea In Bar and Objection To Production of Transcript of Evidence" (R. 45–46). In that pleading, the Government alleged that the plea in bar was insufficient on its face and denied that the petitioner had been compelled to give any information against himself under oath or otherwise. To this pleading was attached an affidavit executed by an attorney for the Securities and Exchange Commission who had participated in all of the proceedings at which the petitioner had appeared before an officer of the Commission pursuant to the *subpoenas duces tecum* referred to in the plea at bar (R. 46–47). This affidavit states that on no occasion was the petitioner sworn or placed under oath by an officer of the Commission, that he was not compelled to testify or give any information against himself or anyone else under oath or otherwise, and that the proceedings on each occasion were recessed shortly after the petitioner had interposed his plea of immunity.

On March 1, 1939, petitioner filed a motion to strike this affidavit (R. 48). On the same day the parties appeared by their respective counsel before

the District Court (R. 48). The court overruled petitioner's plea in bar and application for production of the transcript of evidence. It also overruled the Government's motion to strike the plea in bar and its objections to the production of the transcript and it similarly overruled petitioner's motion to strike the affidavit attached to the Government's motion (R. 48).

On October 25, 1939, petitioner withdrew his plea of not guilty and entered a plea of *nolo contendere* to each count (R. 49). He was thereupon sentenced to imprisonment for a term of three years on each count, the sentences to run concurrently (R. 49–50).

Petitioner then took an appeal to the court below (R. 50–51). On May 20, 1940, a brief was filed on his behalf in that court, reading in part as follows (p. 15):

> *We wonder if this Court would not like to see the transcript of the testimony of Appellant before the Commission showing his compulsion, his claim of immunity, and his testimony against himself in order that the truth might be known.* [Italics in original.]

The case came on for argument before the court below on June 19, 1940. At that time, at the instance of the Government and over the objection of the petitioner, the court received and filed an affidavit of one John Brett, an Assistant United States Attorney, and transcripts of the proceed-

ings before the Securities and Exchange Commission at which the petitioner had appeared. In his affidavit, Brett stated that at the hearing before the District Court on March 1, 1939, on defendant's plea in bar and application for the production of the transcripts, counsel for the Government had stated to the court that they had the transcripts of the proceedings before the Commission, and that "if the government's affidavit was not sufficient, the government would offer them in evidence if the Court desired to examine them; that upon being so advised, His Honor, Judge Vaught, stated that he did not care to see the transcripts, that he did not need them to pass upon said plea in bar, and that he was going to overrule the defendant's plea in bar" (R. 52–53).

The transcripts of the testimony filed in the court below (R. 53–69) show that each time the petitioner appeared before an officer of the Securities and Exchange Commission, he claimed his privilege against self-incrimination and was thereupon dismissed without testifying. They further disclose that none of the petitioner's books or records was introduced in evidence or examined by any representative of the Commission.

SUMMARY OF ARGUMENT

I

The plea in bar is insufficient on its face. It states only that petitioner was forced to testify,

after claiming his privilege against self incrimination, concerning two things: (1) his identity and relationship to various trusts and organizations which are the subject matter of the prosecution; and (2) "divers and sundry other matters pertaining to the matters" which are the subject of the prosecution, and particularly concerning his "personal entries, books, and records * * * which are a part of the subject matter of this prosecution." The plea does not state what "other matters" petitioner was forced to testify to and it does not state that these other matters tended to incriminate petitioner or led to the discovery of his crime; it states only that they were "matters pertaining to the matters which are the subject of this prosecution." Further, the plea does not allege the nature of the testimony which petitioner was forced to give concerning these other matters or concerning his personal records, and it does not allege that petitioner's personal records were introduced in evidence in the proceedings or even examined by any representative of the Securities and Exchange Commission. Such a plea is plainly insufficient and was therefore properly overruled by the District Court.

II

Even assuming the plea to be sufficient, it was properly overruled because of petitioner's failure to prove its allegations. The burden of proof being on the petitioner, it was incumbent upon him to

introduce distinct evidence to establish the plea. This he failed to do. He neither introduced evidence in support of his plea nor did he offer to introduce such evidence, and, despite the assertions to the contrary in his brief, the record fails to show that he was denied an opportunity to present proof.

III

The District Court did not err in refusing petitioner's application for transcripts of his testimony before the Securities and Exchange Commission.

1. If, as we contend, the plea is insufficient on its face, it is plain that the application was properly overruled. Petitioner sought the transcripts for the sole purpose of helping him prove his plea; the process of the court was not available to him for this purpose if the plea was insufficient.

2. Even if the plea be deemed sufficient, production of the transcripts was not necessary in order to enable petitioner to establish his plea. Other means were readily available to him to sustain his position. He could have taken the stand himself and testified under oath as to the testimony which he had been compelled to give. His attorney could also have given similar testimony since the attorney was present at all the proceedings before the Commission. And petitioner could have called as a witness any of the Commission's representatives who had participated at those proceedings. In the

absence of any effort on petitioner's part to adduce proof by any of these readily available means, the refusal of the District Court to order production of the transcripts cannot be considered as error, much less as reversible error.

3. The Rules of Practice of the Securities and Exchange Commission do not confer upon petitioner a right to the transcripts. These Rules specifically provide that transcripts shall be furnished to parties to "hearings" conducted by the Commission, but they have no application to transcripts of testimony taken during the course of an "investigation," such as that here involved.

4. The general rules of law governing the availability to defendants in criminal cases of documents or the minutes of investigatory proceedings which are in the hands of the prosecution likewise do not establish petitioner's right to the transcripts. An application for the production of such documents or minutes is addressed to the discretion of the trial court and the court will not, in the exercise of its discretion, grant the application unless the defendant makes a *prima facie* showing that the documents or minutes are necessary in the furtherance of justice; where there is some reason of policy why the document or minutes should remain confidential, a more persuasive showing of need for them will be required before production or inspection will be ordered than would otherwise be the case. Applying these principles to the case

at bar, it is clear that the District Court did not abuse its discretion in refusing to order production of the transcripts.

Moreover, even if it be held that the refusal of the District Court to inspect the transcripts was error, the error was plainly not prejudicial, for examination of the transcripts would simply have confirmed the insubstantiality of petitioner's plea in bar and would necessarily have resulted in the overruling of that plea.

IV

The action of the court below in receiving and filing the transcripts of testimony did not constitute reversible error. Even if we assume that the court below did err in this regard, the error was clearly not prejudicial. For the reasons already stated, the record, apart from the transcripts, establishes that the District Court properly overruled the plea in bar. Consequently, irrespective of the transcripts, the court below was required to affirm. Affirmance being in any event required, the fact that the court may have erroneously relied for its decision upon transcripts improperly received cannot be considered reversible error any more than if the court had used erroneus reasoning to reach a correct result. Moreover, the opinion rendered by the court below plainly indicates that its decision was in no way predicated upon the transcripts.

In our view, however, the action of the court below in receiving the transcripts was entirely proper. The only possible error of the District Court was in not looking at the transcripts itself; even if this were error, reversal would be called for only if the error were prejudicial. On the question of prejudice, we believe that the court below could, and this Court can, properly examine the transcripts. This question does not depend on issues of fact determinable in the first instance by the trial court; the Circuit Court of Appeals and this Court are plainly as competent as the District Court to determine that, on their face, the transcripts furnish no support for petitioner's plea. In these circumstances, there is no reason why the court below should not itself have examined the transcripts instead of remanding the case for the District Court to examine them. Such a remand would have been a purely formal and useless gesture since it was manifest that, after its examination, the District Court would have had to take the same action with respect to the plea as it took before.

V

The action of the court below in basing its affirmance of the judgment of conviction upon the validity of the conspiracy count, which alone does not support a three-year sentence, does not constitute reversible error. The grounds upon which the petitioner attacked the conspiracy count include

all the objections which he raised which are applicable to counts four and five of the indictment, each of which counts is sufficient to support the three-year sentence. Consequently, in passing upon the objections which petitioner raised to the conspiracy count, the court below likewise passed upon all the applicable objections to counts four and five.

VI

All of the objections raised by the petitioner to the validity of the indictment are insubstantial, if not capricious.

VII

The error of the District Court in imposing a three-year sentence on the conspiracy count, for which the maximum sentence provided by statute is two years, may be corrected by this Court or by the District Court on remand.

ARGUMENT

I

THE PLEA IN BAR IS INSUFFICIENT ON ITS FACE AND WAS THEREFORE PROPERLY OVERRULED

There is, of course, no dispute that if petitioner had pleaded and proved that he was forced to testify against himself before an officer of the Securities and Exchange Commission concerning the subject matter of the indictment, he would have been entitled to have the indictment dismissed. Section 22 (c) of the Securities Act of 1933 (15 U. S. C. § 77v (c)) provides that no person shall

be excused from testifying before an officer of the Commission on the ground that his testimony might tend to incriminate him, but that—

> no individual shall be prosecuted * * * for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.[2]

It is the position of the Government that the allegations of petitioner's plea in bar do not state facts sufficient to show that petitioner was entitled to the statutory amnesty, and that, even if the plea in bar be deemed sufficient, petitioner has failed either to prove the allegations of his plea or to establish that he was denied an opportunity to prove them.

The allegations of the plea concerning the alleged self-incrimination (R. 42) state that petitioner on three different occasions appeared before an officer of the Securities and Exchange Commission in response to subpoenas *duces tecum* and—

> after having claimed his immunity against self-incrimination, as provided by law and

[2] The amnesty thus granted, as this Court held in construing an identical statutory provision in *Heike* v. *United States*, 227 U. S. 131, 142, is to be construed, so far as possible, "as coterminus with what otherwise would have been the privilege of the person concerned" under the Fifth Amendment.

> the Constitution of the United States, under compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution.

It will be noted that the plea states only that petitioner was forced to testify, after claiming his privilege, concerning two things: (1) his identity and relationship to various trusts and organizations which are the subject matter of the prosecution; and (2) "divers and sundry other matters pertaining to the matters" which are the subject of the prosecution, and particularly concerning his "personal entries, books and records * * * which are a part of the subject matter of this prosecution." The plea does not state what "other matters" petitioner was forced to testify to, it does not state the nature of the testimony he was forced to give concerning these other matters or concerning his personal records, and it does not allege that petitioner's personal records were introduced in evidence in the proceedings or even examined by any representative of the Securities and Exchange

Commission. Such a plea, we submit, is plainly insufficient on its face.

The decision of this Court in *Heike* v. *United States*, 227 U. S. 131, is persuasive authority in support of our position. There the petitioner had been indicted for frauds on the revenues accomplished by a certain sugar company through the secret introduction of springs in the company's scales so as to reduce the apparent weight of imported sugar. The petitioner pleaded in bar to this indictment that he had been compelled to testify against himself before a federal grand jury investigating alleged violations of the Sherman Act by the sugar company, and that, therefore, he was entitled to the statutory amnesty provided by the Sherman Act. A trial was had on this plea, at which it was shown that the petitioner had appeared before the grand jury, had testified as to his identity and as to his official relationship to the sugar company, and had produced certain checks signed by him and a table summarizing the operations of the company, which had been compiled from the company's books at his direction. On the basis of this evidence, the trial court directed a verdict for the Government on the plea in bar and this Court affirmed. The Court held that petitioner's testimony as to his identity and his relationship to the sugar company, although facts relevant to the indictment against him, did not have such a tendency to incriminate him as to entitle

him to immunity. With respect to the checks and the summary of operations, the Court, holding that these documents did not constitute evidence concerning the subject matter of the indictment, stated (227 U. S. at 144): "When the statute speaks of testimony concerning a matter it means concerning it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law." Cf. *Mason* v. *United States*, 244 U. S. 362.

Under the holding of the *Heike* case, it is plain that the allegation of the plea in bar in the present case to the effect that petitioner was compelled to testify, after claiming privilege, as to his "identity and relationship to various trusts and organizations which are the subject matter of this prosecution," does not state facts sufficient to entitle him to immunity. And the same is true, we submit, with respect to the allegation concerning the "divers and sundry other matters" concerning which petitioner alleges he was forced to testify. The plea does not state that these matters tended to incriminate the petitioner or led to the discovery of his crime; it states only that they were "matters pertaining to the matters which are the subject of this prosecution." Such an allegation is plainly insufficient, particularly in view of the fact that the petitioner, who verified the plea, must have known, in a general way at least, the matters concerning which he

testified, and that petitioner's attorney, who signed the plea, was present at all the proceedings at which the alleged testimony was given (R. 46–47, 53–69). Cf. *Holt* v. *United States*, 218 U. S. 245; *Hillman* v. *United States*, 192 Fed. 264 (C. C. A. 9th).

Examination of the transcripts of petitioner's testimony before the Securities and Exchange Commission [3] reveals how subtly the plea in bar was drawn so as to give a semblance of substance to a wholly insubstantial claim of immunity. The actual testimony given by the petitioner was confined to the statements, not made under oath, that he had brought with him all of the available books and records of the various trusts called for by the *subpoenas duces tecum* served upon him (R. 55, 59); that these books and records contained entries relating to his own personal affairs as well as to the affairs of the trusts (R. 56); that the personal entries could not be segregated from the trust entries (R. 57–58, 62, 67); and that the books had been audited (R. 56). Petitioner having claimed his privilege against self-incrimination, the books were not introduced in evidence or examined by any representative of the Securities and Exchange Commission.

Although this testimony plainly does not entitle petitioner to the statutory amnesty, it was, none-

[3] For the reasons stated below (pp. 37–40), we believe that this transcript is properly part of the record before this Court, even though it was not introduced in evidence in the District Court.

theless, in the words of the plea in bar, testimony concerning "matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution." This demonstrates conclusively, we believe, that the allegations of the plea do not state facts sufficient, even if proved, to establish petitioner's claim of immunity. Accordingly, the action of the District Court in overruling the plea was clearly correct.

II

EVEN IF THE PLEA IN BAR BE DEEMED SUFFICIENT ON ITS FACE, IT WAS PROPERLY OVERRULED BECAUSE OF PETITIONER'S FAILURE TO PROVE ITS ALLEGATIONS

Even assuming the plea to be sufficient on its face, it was properly overruled by the District Court because of petitioner's failure to prove its allegations. The Government having controverted the plea, the burden of proof was, of course, on the petitioner. *Nardone* v. *United States*, 308 U. S. 338, 341; *Martin* v. *Texas*, 200 U. S. 316; *Brownfield* v. *South Carolina*, 189 U. S. 426; *Tarrance* v. *Florida*, 188 U. S. 519; *Smith* v. *Mississippi*, 162 U. S. 592; *Lee* v. *United States*, 91 F. (2d) 326, 329 (C. C. A. 5th); *Mulloney* v. *United States*, 79 F. (2d) 566, 575 (C. C. A. 1st). Petitioner failed utterly to sustain this burden, since he neither introduced nor offered to introduce any proof in support of his plea.

It is firmly established that the facts stated in the plea, even though the plea itself is verified, cannot be used as evidence to establish those facts. *Smith* v. *Mississippi, supra; Tarrance* v. *Florida, supra; Martin* v. *Texas, supra; Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th). In order to sustain the burden of proof, it is incumbent upon the defendant to introduce, or offer to introduce, distinct evidence to establish his plea (*id.*). Here there was neither proof nor offer of proof, and consequently, unless petitioner can show that he was denied an opportunity to offer proof,[4] the order of the District Court overruling the plea must be affirmed.

Petitioner asserts in his brief at various places that he was denied an opportunity to offer proof (Br. 5, 10, 16–17, 22), but the record fails to bear out the assertion. It is true that the plea in bar does contain a prayer that petitioner "be heard on the merits of this plea" (R. 44), but this Court has specifically held that such a prayer is of no avail in the absence of an actual offer of proof. *Martin* v. *Texas,* 200 U. S. 316, 319; see also *Brownfield* v. *South Carolina,* 189 U. S. 426, 429; *Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th). And the record furnishes no support for any con-

[4] It is clear, of course, that a denial of opportunity to offer proof in support of the plea would constitute reversible error. *Martin* v. *Texas,* 200 U. S. 316, 319; *Carter* v. *Texas,* 177 U. S. 442, 448; *Mamaux* v. *United States,* 264 Fed. 816, 819 (C. C. A. 6th).

tention that petitioner made an actual offer of evidence which was rejected, or that the District Court failed to give him an opportunity to offer such evidence. Since the burden of establishing lack of opportunity to offer proof is on petitioner, the silence of the record must be taken against him. This Court has expressly ruled that, in the absence of an affirmative showing in the record that the defendant was denied an opportunity to offer proof, it must be assumed that he did have such an opportunity. *Martin* v. *Texas, supra; Brownfield* v. *South Carolina, supra;* see also *Mamaux* v. *United States, supra;* cf. *Smith* v. *Mississippi, supra.*

III

THE REFUSAL OF THE DISTRICT COURT TO ORDER PRODUCTION OF THE TRANSCRIPTS OF TESTIMONY DID NOT CONSTITUTE A DENIAL OF OPPORTUNITY TO OFFER PROOF

1. If, as we contend, the plea is insufficient on its face, it is plain that the District Court properly denied petitioner's application for production of the transcripts of the testimony which petitioner gave during the course of the Securities and Exchange Commission investigation. Petitioner sought these transcripts for the sole purpose of helping him prove his plea; certainly the process of the court was not available to him for this purpose if the plea was insufficient on its face.

2. Even if the plea be deemed sufficient on its face, it can scarcely be contended that production

of the transcripts was necessary in order for petitioner to establish his plea or that the District Court's refusal to order their production constituted, *per se*, a denial of opportunity to offer proof. Other means were readily available to petitioner to sustain his position. He could have taken the stand himself and testified under oath as to the testimony which he had been compelled to give during the Securities and Exchange Commission investigation.[5] His attorney could also have given similar testimony, since the attorney was present at all the proceedings before the Commission (R. 46–47, 53–69). And petitioner could have called as a witness any of the Commission's representatives who had participated at those proceedings.

In the absence of any effort on petitioner's part to adduce proof of the facts stated in his plea by any of these readily available methods of proof, we submit that the refusal of the District Court to order production of the transcripts cannot be considered as error, much less as reversible error. As we show below, petitioner's failure to establish a

[5] The verification of the plea in bar by petitioner cannot be treated as the equivalent of his taking the stand and testifying since, as we have pointed out, such a verification does not constitute proof of the facts stated in the plea (p. 24, *supra*). This rule has a firm practical basis. The plea sets forth an incomplete and *ex parte* story; called to the stand as a witness, petitioner would have been subject to cross-examination as to precisely what had occurred during the course of the Commission's investigation.

prima facie case by adducing such proof justified the District Court, in the exercise of its discretion, to refuse the application for production of the transcripts (see pp. 29–34, *infra*). And, even if it be held that it would have been better practice for the District Court to have granted the application, the availability of these other methods of proof shows that its failure to do so did not deny the petitioner an opportunity to prove his case.

3. Petitioner relies, in part, for his alleged right to secure transcripts of his testimony before the Securities and Exchange Commission upon Rule IV (c) of the Rules of Practice promulgated by the Commission (Code of Federal Regulations, Vol. 17, § 201.4 (c)). This Rule provides as follows:

> Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

This Rule is of no avail to petitioner since it relates only to "hearings" and not to "investigations." Rule XVI of the Commission's Rules of Practice specifically provides that the Rules do not apply to investigations.[6] That these Rules are fully

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[6] Rule XVI, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939. See Code of Federal Regulations, Vol. 17, § 201.16.

justified by the statute and are reasonable in character has been recognized in *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D. N. Y.),[7] affirmed 84 F. (2d) 316 (C. C. A. 2d), reversed as moot, 299 U. S. 504; and *United States* v. *Maschuch*, 30 F. Supp. 976 (S. D. N. Y.), affirmed, 111 F. (2d) 602 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 116, present Term.

Petitioner alleges in his brief (pp. 14–15, 22) that he was entitled to the transcript under Rule IV (c) because his plea refers to the Commission proceedings as "hearings." But the plea also refers to those proceedings as an "investigation" (R. 42). And a letter to defendant's attorney from the General Counsel of the Commission, attached as an exhibit to the plea (R. 44–45), likewise refers to the proceedings as an investigation. The plea it-

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[7] In this case it was said by the District Court (p. 418): "'The hearing referred to in the Securities Exchange Act and in the rules of the Commission is a proceeding of relative formality, generally public, with definite issues of fact or of law to be tried, in which the parties proceeded against have a right to be heard. It is much the same as a trial. It may terminate in a final order. An investigation, on the other hand, is informal, preliminary, and usually private. It is conducted to determine whether grounds exist for taking more formal proceedings. There are no parties in any substantial sense, no definite issues. There is no right to be heard. * * *"

self therefore fails to state a case coming within Rule IV (c). Moreover, petitioner, who had the burden of proof, failed to offer any evidence to establish that the proceedings were in fact hearings.[8]

In this state of the record, it is plain that petitioner cannot rely upon the Commission's Rules to establish his alleged right to production of the transcripts of testimony. His right, if any, must depend rather upon the general rules of law governing the availability to defendants in criminal cases of documents or the minutes of investigatory proceedings which are in the hands of the prosecution.

4. On this aspect of criminal procedure, the law is in a state of extreme confusion. See the discussion of the problem by Mr. Justice (then Judge) Cardozo in *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; see also (1939) 39 Col. L. Rev. 287. Nevertheless, several of the guiding principles may be stated with some degree of certainty: (1) an application by a defendant for the production of a document in the hands of the prosecution, or for inspection of the minutes of investigatory proceedings, is addressed to the discretion of the trial court;[9] (2) the court will not, in the exercise of its

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[8] Petitioner could not, of course, have proved that the proceedings were hearings since, as shown by the transcripts introduced in the Circuit Court of Appeals (R. 53–69), they were, in fact, parts of an investigation.

[9] *Metzler* v. *United States*, 64 F. (2d) 203 (C. C. A. 9th); *Murdick* v. *United States*, 15 F. (2d) 965 (C. C. A. 8th); *United States* v. *Violon*, 173 Fed. 501 (S. D. N. Y.); *United*

discretion, order the production of such a document or the inspection of such minutes unless the defendant makes a *prima facie* showing that this is necessary in the furtherance of justice;[10] and (3) where there is some reason of policy why the document or minutes should remain confidential, a more persuasive showing of need for them on the part of the defendant will be required before production

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States v. *Perlman*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646 (S. D. N. Y.); *United States* v. *Herzig*, 26 F. (2d) 487 (S. D. N. Y.); *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.); *Kirkpatrick* v. *Pope Mfg. Co.*, 61 Fed. 46 (D. Conn.); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *Commonwealth* v. *Bartolini*, 299 Mass. 503, 13 N. E. (2d) 382; *State* v. *Di Noi*, 59 R. I. 348, 195 Atl. 497; *Massie* v. *People*, 82 Colo. 205, 258 Pac. 226; *State* v. *Fitzgerald*, 130 Mo. 407, 32 S. W. 1113; *People* v. *Gatti*, 167 Misc. 545, 4 N. Y. Supp. (2d) 130; *People* v. *Macner*, 171 Misc. 720, 13 N. Y. Supp. (2d) 451; (1939) 39 Col. L. Rev. 287; 6 *Wigmore on Evidence* (3d ed.), p. 395; 2 *Wharton's Criminal Evidence* (11th ed.), p. 1353.

[10] *Nardone* v. *United States*, 308 U. S. 338, 341–342; *Cox* v. *Vaught*, 52 F. (2d) 562 (C. C. A. 10th); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *United States* v. *Jones*, 16 F. Supp. 135 (S. D. N. Y.); *In re Romine*, 138 Fed. 837 (N. D. W. Va.); *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; *People* v. *Nields*, 70 Cal. App. 191, 232 Pac. 985; *People ex rel. Page* v. *Terte*, 324 Mo. 925, 25 S. W. (2d) 459; *People* v. *May*, 158 Misc. 488, 287 N. Y. Supp. 162; *people* v. *Gatti*, 167 Misc. 545, 4 N. Y. Supp. (2d) 130; 2 *Wharton's Criminal Evidence* (11th ed.), pp. 1353–1354.

or inspection will be ordered than would otherwise be the case.[11]

Applying these principles to the case at bar, we believe it clear that the District Court did not abuse its discretion in refusing to order production of the transcript of testimony. The burden was on the petitioner to satisfy the trial court as to the solidity of his claim and to establish that it was "sufficient to justify the trial court's indulgence of inquiry" (cf. *Nardone* v. *United States*, 308 U. S.

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[11] *McKinney* v. *United States*, 199 Fed. 25 (C. C. A. 8th); *Cox* v. *Vaught*, *supra*; *United States* v. *Perlman*, *supra*; *United States* v. *Herzig*, *supra*; *United States* v. *Oley*, *supra*; *United States* v. *Price*, *supra*; *United States* v. *Goldman*, 28 F. (2d) 424, 432 (D. Conn.); *People* v. *May*, *supra*; *cf. Metzler* v. *United States*, *supra*; see 2 Moore's *Federal Practice*, p. 2461, note 1.

The principles stated in the text are comparable to the rules applicable in civil cases under the Federal Rules of Civil Procedure. Rule 34 provides:

"Upon motion of any party *showing good cause therefor* and upon notice to all other parties, the court in which an action is pending *may* (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, *not privileged*, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; * * *." [Emphasis supplied.]

Only in a few jurisdictions, however, have the courts afforded an accused an opportunity for discovery and inspection which is comparable to that enjoyed by a party to a civil action. See 6 *Wigmore on Evidence* (3rd ed.), pp. 475–476; *People ex rel. Lemon* v. *Supreme Court*, 245 N. Y. 24; but cf. 2 *Wharton's Criminal Evidence* (11th ed.), p. 1352.

338, 342). That burden the petitioner entirely failed to sustain. Not only was his plea in the most general of terms, but he made no effort to offer other proof to establish his plea, although such other proof was readily available to him (see pp. 25–26, *supra*). The Government, on the other hand, filed an affidavit in opposition to the plea in which an attorney for the Securities and Exchange Commission, who had participated in all of the proceedings at which the petitioner had appeared, categorically stated that petitioner had not been compelled to testify or give information against himself, and that each of the proceedings had been recessed shortly after petitioner had interposed his plea of immunity. In view of this affidavit, which the District Court was clearly entitled to consider (*United States* v. *Jones*, 16 F. Supp. 135, 137 (S. D. N. Y.)), and of petitioner's failure to offer any contrary evidence, the action of the District Court appears to have been fully justified.

Furthermore, investigations conducted by the Securities and Exchange Commission are, as the Rules of the Commission recognize, necessarily secret and confidential in nature; they are analogous to grand jury proceedings. *Woolley* v. *United States*, 97 F. (2d) 258, 262 (C. C. A. 9th), certiorari denied, 305 U. S. 614; *Consolidated Mines of California* v. *Securities and Exchange Commission*, 97 F. (2d) 704, 708 (C. C. A. 9th); *In re Securities and Exchange Commission*, 14 F. Supp. 417 (S. D.

N. Y.), affirmed, 84 F. (2d) 316 (C C. A. 2d), reversed as moot, 299 U. S. 504.[12] To require the production of a transcript of the testimony taken during the course of such an investigation might, in many cases, require the Government to disclose its evidence against the defendant. This objection, it is true, does not apply to a transcript limited to the defendant's own testimony, yet the production of even such a transcript might be prejudicial in two respects: first, it might force the Government to reveal a part of its evidence against other persons involved in the investigation and to make public the fact that such other persons are being investi-

[12] The principles discussed in this section of the brief are derived to a large extent from decisions concerning grand jury minutes. Such minutes are, of course, secret and confidential. While the courts have power, in the exercise of their discretion, to grant motions calling for inspection of grand jury minutes, or may themselves examine the minutes, this power is rarely exercised and then only after an affirmative showing that the only evidence presented to the grand jury was incompetent or illegal, or that the evidence was presented in violation of the constitutional rights of the accused, or that the indictment was obtained as a result of corruption, fraud, or caprice. The following cases deal with the right to inspect grand jury minutes when there is a claim of immunity because of self-incrimination before the grand jury: *United States* v. *Kimball*, 117 Fed. 156 (S. D. N. Y.); *United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.); *People* v. *Clifford*, 105 Colo. 316, 98 Pac. (2d) 272; *Murphy* v. *State*, 124 Wis. 635; *Havenor* v. *State*, 125 Wis. 444; *State ex rel. Robertson* v. *Steele*, 117 Minn. 384, 135 N. W. 1128; *People* v. *Maoner*, 171 Misc. 720, 13 N. Y. Supp. (2d) 151; *People* v. *Coyle*, 172 Misc. 593, 15 N. Y. Supp. (2d) 441; *cf. United States* v. *Wetmore*, 218 Fed. 227 (W. D. Pa.). The following cases deal with the right to inspect

gated; and second, it assures that the defendant's story at the trial will be the same as the story which he told at the investigation, thus minimizing the possibilities of impeachment. We do not urge, of course, that these considerations require the secrecy of the investigation to remain in all circumstances inviolate; we urge merely that they are factors to be weighed by the court in determining how its discretion shall be exercised. And when, as here, the application for a transcript of the testimony taken during such a secret investigation is based upon general allegations unsupported by proof, the refusal of the application cannot be deemed an abuse of discretion.

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minutes when there is a claim that illegally obtained evidence was used before the grand jury: *United States* v. *Jones*, 16 F. Supp. 135 (S. D. N. Y.); *United States* v. *Gouled*, 253 Fed. 242 (S. D. N. Y.); *United States* v. *Lydecker*, 275 Fed. 976 (W. D. N. Y.); *United States* v. *Rubin*, 214 Fed. 507 (D. Conn.); *United States* v. *Jones*, 69 Fed. 973, 978 (D. Nev.); *cf. United States* v. *Price*, 163 Fed. 904 (S. D. N. Y.). The following cases deal with the right to inspect minutes when there is a claim that the only evidence before the grand jury was insufficient or incompetent: *McKinney* v. *United States*, 199 Fed. 25 (C. C. A. 8th); *Cox* v. *Vaught*, 52 F. (2d) 562 (C. C. A. 10th); *Kastel* v. *United States*, 23 F. (2d) 156 (C. C. A. 2d); *United States* v. *Violon*, 173 Fed. 501 (S. D. N. Y.); *United States* v. *Perlmun*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Garsson*, 291 Fed. 646 (S. D. N. Y.); *United States* v. *Herzig*, 26 F. (2d) 487 (S. D. N. Y.); *United States* v. *Oley*, 21 F. Supp. 281 (E. D. N. Y.); *United States* v. *Cobban*, 127 Fed. 713 (D. Mont.); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.); *United States* v. *Goldman*, 28 F. (2d) 424, 431 (D. Conn.); *cf. Metzler* v. *United States*, 64 F. (2d) 203 (C. C. A. 9th).

Despite the foregoing considerations, we believe that, in cases where the plea states facts sufficient, if proved, to establish the defendant's immunity, the better practice is for the District Court itself to examine the transcript of the testimony without, however, ordering its submission to the defendant.[13] The propriety of this course has been indicated in several cases involving grand jury minutes. *United States* v. *Kimball*, 117 Fed. 156 (S. D. N. Y.); *United States* v. *Perlman*, 247 Fed. 158 (S. D. N. Y.); *United States* v. *Gouled*, 253 Fed. 242 (S. D. N. Y); *United States* v. *Silverthorne*, 265 Fed. 853 (W. D. N. Y.). However, in no case that we have found has it been held or even intimated that the trial court is under a mandatory obligation to adopt this practice; to the contrary, almost all of the decisions emphasize that the matter is one for the discretion of the trial judge. See cases cited in note 9, p. 29, *supra*. We submit, therefore, that irrespective of what the better practice might have been had the plea here been sufficient on its face, failure to follow that practice in the circumstances of this case cannot be held to be an abuse of discretion.

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[13] At the hearing before the District Court, the Government offered to introduce the transcripts in evidence if the court desired to examine them (R. 52–53).

Finally, it should be noted that, even if the refusal of the District Court to inspect the transcripts be considered error, the error was plainly not prejudicial. Examination of the transcripts would simply have confirmed the insubstantiality of petitioner's plea in bar and would necessarily have resulted in the overruling of that plea. For the reasons stated in the next succeeding section of this brief, we believe that the fact that the transcripts were not made part of the record before the District Court did not preclude the court below, and does not preclude this Court, from looking at the transcripts for the purpose of determining whether or not the failure of the District Court to inspect them, if error, was prejudicial error.

IV

THE ACTION OF THE COURT BELOW IN RECEIVING AND FILING THE GOVERNMENT'S AFFIDAVIT AND THE TRANSCRIPTS OF TESTIMONY DID NOT CONSTITUTE REVERSIBLE ERROR

As pointed out in the Statement (*supra*, p. 10), petitioner's brief in the court below in effect invited the Government to show the Circuit Court of Appeals the transcripts of his testimony before the Securities and Exchange Commission. Thereafter, when the case came on for argument before the Circuit Court of Appeals, the Government presented those transcripts to the court, together with an affidavit executed by an Assistant United States

Attorney, stating that at the hearing before the District Court the Government had offered to introduce the transcripts in evidence if the court desired to examine them, but that the District Judge had stated that he did not need them in order to pass upon the plea (R. 52–53). Over petitioner's objection, the affidavit and transcripts were received and filed by the court below (R. 52). This action petitioner alleges to have been error.

Even if we assume that the court below did err in this regard, the error was clearly not prejudicial. For the reasons already stated, the record, apart from the transcripts, establishes that the District Court properly overruled the plea in bar. Consequently, irrespective of the transcripts, the Circuit Court of Appeals was required to affirm its action. Affirmance being in any event required, the fact that the court may have erroneously relied for its decision upon papers improperly received cannot be considered reversible error any more than if the court had used erroneous reasoning to reach a correct result. But beyond this, the opinion rendered by the court below indicates quite clearly that its decision was in no way predicated upon the affidavit and transcripts. Accordingly, even if petitioner could establish that they were improperly received and filed, there would be no occasion for reversal and remand.

In our view, however, the action of the Circuit Court of Appeals in the circumstances of this case

was entirely proper. We do not urge, of course, that a federal appellate court may receive evidence, not in the record before the District Court, on the merits of the question before it. But that is not this case. The only possible error of the District Court here was in not looking at the transcripts itself; even if this were error, reversal would have been called for only if the error were prejudicial. And it is on the question of prejudice that we believe that the Circuit Court of Appeals could, and this Court can, properly examine the transcripts. This question does not depend on issues of fact determinable in the first instance by the trial court; the Circuit Court of Appeals and this Court are plainly as competent as the District Court to determine that, on their face, the transcripts furnish no support for petitioner's plea. In these circumstances, there is no reason in principle or precedent why the Circuit Court of Appeals should not itself have examined the transcripts instead of remanding the case for the District Court to examine them. On the contrary, such a remand would have been a purely formal and useless gesture, since it was manifest that, after its examination, the District Court would have had to take the same action with respect to the plea as it took before.

Persuasive authority in support of our position is furnished by the many decisions holding that, even though a trial court has erred in refusing to

permit the introduction of certain documents or testimony, the appellate court will not reverse and remand if, upon examination of the proffered documents or testimony, it clearly appears that their admission into evidence would not have affected the result.[14] In that type of situation, as here, the appellate court examines a document not considered by the District Court in order to determine whether or not the failure of the District Court to consider it was prejudicial error. The only distinction between that situation and this is that there the rejected document is normally marked for identification in the District Court and thus is part of the record certified by the District Court to the Circuit Court of Appeals; while here the document is not part of the record so certified. This distinction, however, is purely formal and in no way affects the substantive rights of the parties. And the practice followed in this case may be the necessary procedure in cases where the document is confidential and where, as here, the District Court declines to examine it.

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[14] See, e. g., *Hanover Fire Ins. Co.* v. *Merchants Transport Co.*, 15 F. (2d) 946 (C. C. A. 9th); *Corrigan* v. *United States*, 82 F. (2d) 106, 109 (C. C. A. 9th); *Parker* v. *The Gulf Refining Co.*, 80 F. (2d) 795 (C. C. A. 6th); *Aetna Life Ins. Co.* v. *McAdoo*, 106 F. (2d) 618, 621 (C. C. A. 8th); *United States* v. *Marsh*, 108 F. (2d) 558 (C. C. A. 4th); *Grand Valley Water Users Ass'n* v. *Zumbrunn*, 272 Fed. 943, 947 (C. C. A. 8th); *Kern* v. *United States*, 169 Fed. 617 (C. C. A. 6th).

Petitioner attempts to meet the force of this position by urging that the reception of the transcripts by the Circuit Court of Appeals denied him the right of cross-examination as to their authenticity and correctness (Br. 43). As we have pointed out, however, the most that petitioner would have been entitled to in the District Court would have been for the court itself to examine the transcripts; had the District Court followed that practice, the petitioner would likewise have had no right of cross-examination. But even apart from this, the right of cross-examination would have been of no avail to petitioner. At best, he could have established by cross-examination that the transcripts were not authentic or not correct and that they were therefore of no probative value. Had he established this, he would have been back in precisely the same position as he was actually in before the District Court, with a plea in bar entirely unsupported by proof.

V

THE ACTION OF THE COURT BELOW IN BASING ITS AFFIRMANCE OF THE JUDGMENT OF CONVICTION UPON THE VALIDITY OF THE CONSPIRACY COUNT, WHICH ALONE DOES NOT SUPPORT A THREE-YEAR SENTENCE, DOES NOT CONSTITUTE REVERSIBLE ERROR

The court below pointed out in its opinion (R. 72) the established rule that where there is a general verdict or finding of guilt on an indictment

containing several counts and the sentences on each count are to run concurrently, the judgment will be sustained on appeal if any count sufficient to support the sentence is valid, irrespective of the validity of the other counts. *Brooks* v. *United States,* 267 U. S. 432, 441; *Pierce v. United States,* 252 U. S. 239, 252; *Abrams v. United States,* 250 U. S. 616, 619; *Claassen* v. *United States,* 142 U. S. 140. The court then proceeded to examine in its opinion the objections raised by petitioner to the eleventh, or conspiracy, count of the indictment and, finding them to be without merit, affirmed the judgment of conviction. In so doing, the court below apparently failed to recognize that, while the District Court had imposed a three year sentence for each count in the indictment, the maximum sentence provided by statute for the offense of conspiracy is two years. Criminal Code, Sec. 37, 18 U. S. C. § 88.

This oversight on the part of the court below, however, plainly does not constitute reversible error, since, contrary to the statement in its opinion (R. 72), the grounds upon which the petitioner attacked the conspiracy count include all the objections which he raised which are applicable to counts four and five of the indictment, each of which counts is sufficient to support the three year sentence. The "Statement of Points Relied On" filed by the petitioner in the court below appears in the record at pages 1–3. In this Statement of Points

petitioner sets forth his objections to the validity of the indictment in eight separate paragraphs. Two of these ((a) and (b)) relate to the indictment as a whole, including the conspiracy count as well as counts four and five; two ((e) and (g)) relate only to counts three, six, seven, eight, nine, and ten; one ((f)) relates specifically to counts four and five, but in a later paragraph ((h)), the same objections are specifically raised to the conspiracy count; and only two paragraphs ((c) and (d)) contain objections which are in terms directed to counts four and five, as well as to the other substantive counts, and which are not also raised in connection with the conspiracy count. The objections raised in these paragraphs (c) and (d), however, are plainly inapplicable to counts four and five. They charge that all the substantive counts are fatally defective because of duplicity and because they do not properly allege that the representations made by the defendant were false. Counts four and five, however, are not based upon false representations but simply upon the sale of securities at a time when no effective registration statement covering those securities was on file with the Securities and Exchange Commission. And since each of these counts relates only to the sale, and delivery after sale, of a single security, the objection of duplicity clearly does not apply to them.

It is manifest, therefore, that in passing upon the objections which petitioner raised to the con-

spiracy count, the court below likewise passed upon all the applicable objections to counts four and five. Under these circumstances, there is, of course, no occasion for this Court to remand the case to the Circuit Court of Appeals for further consideration of the validity of the indictment. To the contrary, in view of the insubstantial, if not capricious, nature of the objections raised by the petitioner to counts four and five, as well as to the other substantive counts, affirmance of the decision below is clearly required. Cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567–568.

VI

THE INDICTMENT IS VALID

Petitioner contends that the whole indictment is invalid because it was endorsed by Ernest W. Clarke as "Foreman" rather than as "Foreman of the Grand Jury" (Br. 24–27); that counts 4, 5, and 11 are invalid because they fail to allege that the securities sold by petitioner were not of a class exempted from registration by the Rules and Regulations of the Securities and Exchange Commission (Br. 29–35, 39); that counts 1 and 2 are invalid because they fail properly to allege that the misrepresentations charged to petitioner were false (Br. 27); that count 3 is invalid because it fails to state in what respects the facts which petitioner allegedly omitted to state are material (Br. 28–29); and that counts 6 to 10 are invalid because the mail

fraud statute upon which they are based has been repealed by the Securities Act of 1933. None of these objections has merit.

1. The indictment was signed by John Brett, Assistant United States Attorney, and endorsed as follows: "A true bill. Ernest W. Clarke, Foreman" (R. 29). Petitioner urges that the endorsement should have read "Ernest W. Clarke, Foreman of the Grand Jury." But the authorities which he cites in no way sustain his position; although, as the court below pointed out (R. 72–73), it would have been better practice to add the words "of the Grand Jury" after the word "Foreman," this was not essential to the validity of the indictment. *United States* v. *Plumer,* 27 Fed. Cas. No. 16,056; *State* v. *Valere,* 39 La. Ann. 1060, 3 So. 186; *State* v. *Patterson,* 150 La. 114, 90 So. 532; *State* v. *Gilson,* 114 Mo. App. 652, 90 S. W. 400; *Hall* v. *Commonwealth,* 143 Va. 554, 130 S. E. 416.

2. The objection that counts 4, 5 and 11 are defective because of failure to charge that the securities sold were not of a class exempted from registration under the Rules and Regulations of the Securities and Exchange Commission is likewise without substance. With respect to this contention, the court below stated (R. 71–72):

> [Section 3 of the Securities Act, as amended] provides that the provisions of the title shall not apply to the classes of

> securities described therein, and that the commission may from time to time add other classes to the exempted categories. The effect of the statute is to except from the scope and operative effect of the title the described classes of securities and others which may be added by the commission. It is clear from the face of the count that the securities described therein do not come within the classes described in the statute. Ordinarily an exception created by a proviso or other distinct or substantive clause of a criminal statute need not be negatived in an indictment. One relying upon such an exception must set it up and establish it * * *.

The ruling of the court below in this respect is fully supported by authority. *McKelvey* v. *United States,* 260 U. S. 353, 356–357; *Schlemmer* v. *Buffalo, Rochester, etc. Ry.,* 205 U. S. 1, 10; *Nicoli* v. *Briggs,* 83 F. (2d) 375 (C. C. A. 10th) and cases cited; cf. *Ledbetter* v. *United States,* 170 U. S. 606.

3. No discussion whatever is needed with regard to the objections raised by petitioner to the sufficiency of the allegations contained in counts 1, 2, and 3; a mere reading of those counts demonstrates the frivolous nature of petitioner's position.

4. Equally frivolous is the contention that the mail fraud statute (Criminal Code, Sec. 215, 18 U. S. C. § 338), which forms the basis of counts 6 to 10, inclusive, has been repealed by the Securities Act of 1933. This contention has several times

been rejected by the lower federal courts. *United States* v. *Rollnick,* 91 F. (2d) 911 (C. C. A. 2d); *United States* v. *Montgomery,* 21 F. Supp. 770 (D. N. Mex.); *United States* v. *Alluay,* 13 F. Supp. 289 (N. D. Tex.).

VII

THE THREE-YEAR SENTENCE IMPOSED BY THE DISTRICT COURT ON THE CONSPIRACY COUNT MAY BE CORRECTED BY THIS COURT

The District Court committed error in imposing a three-year sentence on the conspiracy count, for which the maximum sentence provided by statute is two years (Criminal Code, Sec. 37, 18 U. S. C. § 88). This error, of course, is not material, since the three-year sentence may, as we have shown, be sustained on any one of the substantive counts. However, should the petitioner desire a correction of the judgment in this respect, this Court may either correct the sentence in its mandate by reducing the term of imprisonment on the conspiracy count from three years to the maximum statutory limit of two years or may remand the case to the District Court with directions to make this correction. *Blitz* v. *United States,* 153 U. S. 308, 318; *Salazar* v. *United States,* 236 Fed. 541 (C. C. A. 8th); *D'Allessandro* v. *United States,* 90 F. (2d) 640 (C. C. A. 3d); *Spirou* v. *United States,* 24 F. (2d) 796 (C. C. A. 2d), certiorari denied, 277 U. S. 596; *Prioi* v. *United States,* 6 F. (2d) 575 (C. C. A. 6th); *Jackson* v. *United States,* 102 Fed. 473 (C. C. A. 9th).

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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FEBRUARY 1941.

APPENDIX

STATUTES AND RULES INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338):

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post office, or station thereof * * * to be sent or delivered by the post-office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

Section 17 (a) of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77q):

> (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * *
>
> * * * * * *

Section 5 (a) of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77e):

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> * * * * * *

Section 3 of the Securities Act of 1933, as amended (U. S. C., Title 15, Sec. 77c) so far as pertinent,

(a) Except as hereinafter expressly provided, the provisions of this sub-chapter shall not apply to any of the following classes of securities;

(Then follows the various classes of securities which are exempt.)

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

Section 24 of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77x):

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Rule IV [1] of the Rules of Practice promulgated by the Securities and Exchange Commission:

* * * * *

> (c) Hearings shall be stenographically reported and a transcript thereof shall be made which shall be a part of the record of the proceeding. Transcripts will be supplied to the parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter.

Rule XVI [2] of the Rules of Practice promulgated by the Securities and Exchange Commission:

> These Rules shall not be applicable to investigations conducted by the Commission pursuant to Sections 8 (e), 19 (b), and 20 (a) of the Securities Act of 1933, as amended; Sections 21 (a) and 21 (b) of the Securities Exchange Act of 1934, as amended; or Sections 11 (a), 13 (g), 18 (a), 18 (b), 18 (c), and 30 of the Public Utility Holding Company Act of 1935.

Rule 200 of the General Rules and Regulations promulgated by the Securities and Exchange Commission under the Securities Act of 1933, as it was in effect at the time of the transactions alleged in counts four and five:

> Subject to the conditions stated in this rule, the following securities are added, pur-

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[1] Rule IV of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule V (c) of the Rules of Practice, as amended December 1, 1939.

[2] Rule XVI of the Rules of Practice, as amended November 4, 1936, is now contained in substance in Rule XIX of the Rules of Practice, as amended December 1, 1939.

suant to section 3 (b) of the Act, to the classes of securities exempted as provided in section 3 (a) of the Act:

Any securities (other than those specified below) upon the condition that the aggregate offering price to the public shall not exceed the sum of $30,000. *Provided, however,* that the amount of the offering shall be reduced by the amount of any other offerings (whether public or private), within one year prior to the offering herein exempted, of securities of the same issuer, or of any person controlling, controlled by, or under common control with such issuer, unless, or except to the extent that, such offerings have been withdrawn or have comprised securities (a) such as are described in section 3 (a) (3) of the Act or (b) issued in connection with the liquidation or the purchase or pledge of the assets of any national banking association and to which the provisions of title I of the Act do not apply by reason of any of the provisions of subsection (a) of section 3 thereof. The aggregate offering price of securities offered at the market shall be taken as the product of the number of units offered multiplied by the price per unit at which the securities were bona fide sold on the first day of sale. The aggregate offering price of any securities exchanged for bona fide outstanding securities or claims shall be determined as provided in rule 205.

This rule shall not be applicable to exempt (1) certificates of deposit, except certificates of deposit or receipts issued pursuant to a plan and/or agreement under which such certificates of deposit or receipts are to be exchanged for bonds issued by the Home Owners' Loan Corporation and/or the net

cash proceeds thereof; (2) securities exchanged for bona fide outstanding securities or claims; (3) voting trust certificates; or (4) overriding royalty interests, oil and/or gas payments, or fractional undivided interests in oil, gas, or other mineral rights.

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SUPREME COURT OF THE UNITED STATES.

No. 377.—October Term, 1940.

Hiram R. Edwards, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 3, 1941.]

Mr. Justice Reed delivered the opinion of the Court.

This case is here upon affirmance by the Circuit Court of Appeals of a sentence imposed after a plea of nolo contendere.[1] We granted certiorari because there were involved certain important questions of criminal procedure, especially with respect to a plea in bar filed by petitioner. That plea claimed immunity from prosecution because of prior incriminating testimony given under compulsion by the petitioner at an investigation conducted by the Securities and Exchange Commission.

The indictment against petitioner, in eleven counts, arose out of an alleged fraudulent scheme for selling interests, created by him as a part of the device, in various oil and gas leases in Oklahoma and Texas. The first three counts charged violations of the fraud provisions of the Securities Act, 15 U. S. C. § 77q(a); the fourth and fifth, violations of the registration provisions of that Act, 15 U. S. C. § 77e; counts six to ten, violations of the mail fraud statute, 18 U. S. C. § 338; and the eleventh count, a conspiracy to commit the offenses previously set forth.

On December 16, 1938, petitioner filed a demurrer, attacking the legal sufficiency of the indictment on a number of grounds. At the same time he filed a "Plea in Bar and Application for Production of Transcript of Evidence." The substance of this plea was the following: That on April 14, 1938, and two successive dates, pursuant to subpoenas duces tecum, petitioner had appeared before an officer of the Securities and Exchange Commission with the books and records called for, and

"after having claimed his immunity against self incrimination, as provided by law and the Constitution of the United States, under

[1] 113 F. (2d) 286.

compulsion, testified under oath, pursuant to various questions propounded and asked him by said officer of said Commission, said testimony concerning said defendant's identity and relationship to various trusts and organizations which are the subject matter of this prosecution and concerning divers and sundry other matters pertaining to the matters which are the subject of this prosecution, and particularly to the personal entries, books and records of said defendant, which are a part of the subject matter of this prosecution."

The pleading goes on to state, upon information and belief, that the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution; that petitioner was compelled to give information and testimony "which it is believed the Government will use against him in the prosecution herein"; and that petitioner was accordingly immune from prosecution under Section 22(c) of the Securities Act.[2] Petitioner further set forth that at the time of the Commission hearings he had demanded a copy of the transcript of his testimony, offering to pay the cost thereof, but that the request had been refused; that on December 1, 1938, he had made a similar request, which also had been refused, as evidenced by an attached letter from the assistant general counsel of the Commission.[3] Petitioner renewed his demand and tender of payment, asserting that it was necessary for him to have the transcript in

[2] 15 U. S. C. § 77*v*(c): "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

[3] In part, the letter read:

"Inasmuch as the evidence adduced by the Commission in the course of its investigation was transmitted to the Attorney General for criminal prosecution and an indictment has been returned, this Commission does not feel it proper to make available to the defendant the testimony taken from witnesses which may be used by the Government in the prosecution of its case. In view of this, the Commission must respectfully refuse to comply with your request. The United States Attorney concurs in this view."

the presentation to the court of his plea in bar, and that it was necessary for the court to have it before passing on the plea. The pleading concludes by praying the court to order that the transcript be furnished petitioner and that he be heard on the merits of this plea in bar.

On February 28, 1939, the Government filed a pleading called a "Motion to Strike Plea in Bar and Objection to Production of Transcript of Evidence." This attacked the sufficiency of the plea in bar on its face in three different respects, and also alleged in the nature of an answer that petitioner

"was never sworn at any time during the proceedings or hearings complained of and at no time produced any books or records, and did not at any time testify under oath, and was never compelled to testify or give any information against himself or anyone else under oath or otherwise and that each of said hearings complained of was recessed shortly after the defendant interposed his plea of immunity."

In support of this last allegation the Government attached an affidavit of an attorney of the Securities and Exchange Commission who had been present on all three occasions when the petitioner claimed to have given incriminating testimony under compulsion.

Petitioner moved to strike this affidavit of the Commission attorney on the ground that it deprived him of his right to cross-examination and that it was "wholly incompetent to establish the facts attempting to be established."

The District Court overruled petitioner's demurrer to the indictment, his plea in bar and application for the transcript, and also his motion to strike the affidavit of the Commission attorney. An affidavit later filed by the Government in the Circuit Court of Appeals shows that at this hearing on petitioner's plea in bar

"counsel for the government of the United States stated to the Court that they had the transcripts of the record in the proceedings . . . and if the government's affidavit was not sufficient, the government would offer them in evidence if the Court desired to examine them; that upon being so advised, His Honor, Judge Vaught, stated that he did not care to see the transcripts, that he did not need them to pass upon the said plea in bar, and that he was going to overrule the defendant's plea in bar."

The Government's motion to strike the plea in bar was overruled, also. Subsequently petitioner withdrew his original plea of not

guilty,[4] and entered a plea of nolo contendere. The District Court sentenced him to three years on each count, the terms to run concurrently. On appeal petitioner assigned as error the action of the District Court in overruling his demurrer and plea.

When the case was argued before the Circuit Court of Appeals the Government submitted, over petitioner's objection, a copy of what it said was a transcript of petitioner's testimony before the Securities and Exchange Commission, supported by an affidavit of the assistant United States attorney in charge of this prosecution. The transcript was offered to buttress the Government's contention that petitioner had in fact given no testimony of an incriminating nature, but the Circuit Court of Appeals did not rest its affirmance even in part upon the contents of the transcript.

The court affirmed because the plea in bar did not allege that the claim of immunity was made in a "hearing" of the Commission as distinguished from an "investigation" and because no evidence was produced by petitioner in support of his plea. As to the demurrer to the indictment, the Circuit Court of Appeals found no error in omitting from the conspiracy count allegations that the classes of securities involved in the alleged frauds were not in the excepted categories of securities in section three of the Securities Act. This was the sole ground of petitioner's attack on the conspiracy count. In the belief that a sentence on this count, to run concurrently with equal sentences on the other counts, made it unnecessary to examine the other counts,[5] the court did not examine the sufficiency of the other counts.

Petitioner urges as grounds for our reversal of the judgment below the errors in overruling his plea in bar and demurrer, in affirming a sentence of three years on the conspiracy count of the indictment without examination of the other counts, and in receiving the transcript of testimony before the Commission and accompanying affidavit as evidence.

Plea in Bar. The Government challenges the sufficiency of the plea in bar to show petitioner's claim to the benefit of the amnesty of Section 22(c). It suggests that the excerpt set out in the third paragraph of this opinion shows only that testimony was given

[4] Petitioner had pleaded not guilty on December 17, 1938.

[5] Claassen *v.* United States, 142 U. S. 140; Gorin *v.* United States, 312 U. S. —.

concerning "defendant's identity and relationship" to the organizations whose securities the indictment charges defendant fraudulently sold; that "other matters" testified to are not specified nor the "nature" of the testimony concerning them or his personal records. But the allegations of the plea are not to be weighed separately. Petitioner's identity and his relationship to the trusts alleged to have been created by him as a part of the fraudulent scheme are of primary importance in the proof of his criminality. This is quite different from the testimony in *Heike* v. *United States*,[6] a prosecution for fraud on the revenue in weighing imported sugar. There former testimony in a Sherman Act proceeding related to official connection with a company involved and also a table showing the amount of sugar handled by the company, and a claim for amnesty was denied because the evidence "neither led nor could have led to a discovery of his crime." Certainly had petitioner given evidence of his creation of the organizations which the indictment says were part of his artifice it might easily have led to discovery of his trickery. It seems, too, that at least some of the other matters were specified, to wit: the personal entries, books and records of petitioner. Likewise the nature of his alleged testimony concerning his records is sufficiently related to the indictment by saying they are a part of the subject matter of this prosecution. The plea is good on its face.

It is next urged that the plea was properly overruled because of petitioner's failure to prove its allegations.[7] Such result is assumed to follow on the theory that as the burden was on petitioner to prove his plea, the failure of the record to show an offer of proof justifies the order. As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the Commission was sufficiently related to the prosecution to support amnesty. In the *Martin* case,[8] this Court said the action dismissing a traversed motion for failure of proof would have been reversed if the opportunity to establish the facts by evidence had been denied the accused. Treating the Government's motion to strike the plea in bar

[6] 227 U. S. 131.

[7] Cf. Nardone *v.* United States, 308 U. S. 338, 341; Martin *v.* Texas, 200 U. S. 316, 319; Mamaux *v.* United States, 264 Fed. 816, 819.

[8] *Supra*, note 7.

as a traverse of that pleading which would justify the order overruling it in the absence of a showing in the record of an offer of proof, that result does not follow where, as here, the plea is accompanied by a motion for the production of the transcript of the former evidence. The plea and motion showed that application had previously been made to the Securities and Exchange Commission for the transcript and had been refused.

We assume that the proceeding in which the former testimony was given was a private and confidential investigation of the Commission rather than a hearing which might eventuate in an order.[9] The Commission's refusal to produce the record indicates that the request had been for a complete transcript of the hearing. It rests in the discretion of the trial court to issue an order to show cause why the complete transcript should not be produced, if it deems all of it necessary, or only so much as may fairly make it appear whether the testimony of petitioner before the Commission was a proper foundation for the amnesty claimed. This is not an instance of the inspection of notes or material gathered by a prosecutor for his own use.[10] What is sought is the production as evidence in the hearing on the plea in bar of the very foundation of the plea. We find nothing in this record to indicate the desirability of secrecy so far as the testimony of petitioner is concerned. The Government introduced in the Court of Appeals a purported transcript of petitioner's former testimony without asserting its confidential character then or in the motion and traverse below.

Finally the Government contends that the refusal to order the production of the testimony was not prejudicial. This argument presupposes that the offer to produce in the trial court and the actual production in the Circuit Court of Appeals was adequate. Otherwise we cannot know what the testimony was which is relied upon for the amnesty. We think that neither offer was an adequate proffer. In neither instance was the petitioner given an opportunity to cross-examine; no witness produced the transcript; it was not certified as a part of the record from the trial court or as a

[9] Cf. In re Securities and Exchange Commission, 14 F. Supp. 417, 418; 84 F. (2d) 316; reversed as moot, 299 U. S. 504.

[10] People *ex rel.* Lemon *v.* Supreme Court, 245 N. Y. 24; cf. Rex *v.* Holland, 4 T. R. (Durnford & East) 691.

part of the records of the agency.[11] The record certified to the Circuit Court of Appeals is the record on which the appeal is to be heard. Criminal Appeals Rules VIII and IX.

The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.[12]

Other Objections. As the case must be remanded, petitioner's objection to the three-year sentence on the conspiracy count is sustained without discussion. Criminal Code, section 37; 18 U. S. C. § 88. Frivolous objection is made to the indictment because it is endorsed "A true bill, Ernest W. Clarke, Foreman" instead of Foreman of the grand jury. This contention is rejected.

Petitioner brings here for review his demurrer to the indictment and each count thereof. The Circuit Court of Appeals found the conspiracy count sufficient against an attack that in charging a conspiracy to violate the Securities Act of 1933 by selling unregistered securities, the count failed to charge that the securities so sold were not of the class exempted from registration under section three of the Act and the rules and regulations thereunder. With this ruling we agree.[13] As the sentence under count eleven, the conspiracy count, was for as long a time as any of the other counts upon which concurrent sentences had been imposed, the Circuit Court of Appeals did not review the alleged deficiencies of the other counts.

Counts four and five are charged with the same fault as eleven. For a like reason we hold them good. Counts one and two describe the scheme to defraud and allege instances of the use of the mails.

[11] Cf. R. S. § 882, as amended, 48 Stat. 1109.

[12] Cf. Walker *v.* Johnston, 312 U. S. —.

[13] McKelvey *v.* United States, 260 U. S. 353, 357.

The brief of petitioner fails to raise any question deserving consideration as to their sufficiency and we see none. Petitioner challenges count three for failure to state the materiality of facts which the count charges were omitted, although they were required to be stated to avoid misleading purchasers.[14] But the count, after describing various ommitted facts by paragraphs, ends such paragraphs with the allegation

"such fact being well known to said defendants and each of them at all times herein mentioned, and such fact being material in order to make the statements made by said defendants, in the light of the circumstances under which they were made, not misleading . . . ."

The facts alleged were obviously material. Counts six to ten inclusive are based upon the mail fraud statute.[15] Petitioner's objection to these counts is that a later act, the Securities Act of 1933, makes it unlawful to use the mails to defraud by the sale of securities. His argument is that in so far as the later act prohibits the fraudulent sale of securities by mail, it repeals by implication the provisions of the old mail fraud statute in so far as they cover securities. We see no basis for a conclusion that Congress intended to repeal the earlier statute. The two can exist and be useful, side by side.[16]

Reversed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[14] Section 17(a)(2), Securities Act of 1933; 15 U. S. C. 77q(a)(2).

[15] Criminal Code, section 215; 18 U. S. C. § 338.

[16] Cf. United States *v.* Rollnick, 91 F. (2d) 911, 918; United States *v.* Montgomery, 21 F. Supp. 770; United States *v.* Allman, 13 F. Supp. 289.

END